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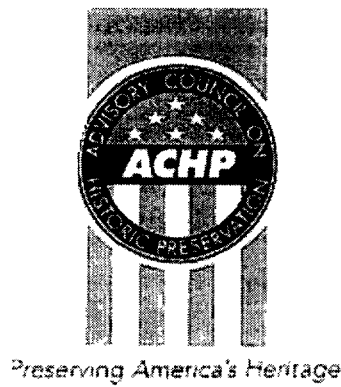
FEB 24 2004

Federal Communications Commission  
Office of the Secretary

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John M. Fowler  
Executive Director



February 19, 2004

Mr. Jeffrey Steinberg  
Deputy Chief  
Commercial Wireless Division  
Federal Communications Commission  
Washington, D.C. 20554

VIA FACSIMILE

REF: FCC Draft Nationwide Programmatic Agreement

Dear Mr. Steinberg:

In response to the request from the Federal Communications Commission (FCC), I am submitting the ACHP's recommended revisions to the draft Nationwide Programmatic Agreement (PA) submitted to us on January 12, 2004 (see enclosed). In doing so, I must express our grave reservations about FCC's approach to finalizing the PA. It has placed us in a most untenable position and hampered our efforts to bring all the consulting parties to consensus on an effective PA.

As previously discussed, we did not anticipate that FCC would unilaterally revise the PA after receiving the comments from the June 9, 2003, Notice of Proposed Rulemaking (NPRM) without further consultation. It was our understanding that the consultation process prescribed in the Section 106 regulations for developing the PA was suspended, not concluded, when FCC published the draft PA for public comment. It was always our expectation that the signatories to the PA (FCC, the National Conference of State Historic Preservation Officers (NCSHPO), and the ACHP) would need to consult further, along with representatives of industry, preservation organizations, and the tribal community, to finalize the terms once the public comments had been received.

FCC's decision to move forward with a rulemaking to embody the terms of the PA imposed severe restrictions on the access of non-signatories, in particular industry and the tribal representatives, to the revised PA, further impeding consultation on the entire document. In addition, FCC set a timetable for consideration of the rulemaking by Commission members that has added one more burden to an already difficult process.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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While FCC did agree, at the request of the major consulting parties, to postpone action on the PA at the Commission's February 2004 meeting, we have now run up against the deadline FCC has established to submit the PA as a proposed rulemaking on the Commission's March 2004 calendar. While we are honoring FCC's mandated deadline, I cannot emphasize too strongly how difficult and frustrating this process has been. The constraints placed on consultation have prevented us from reaching a consensus, due in large part to the lack of time for industry representatives to seek input from their members.

Nevertheless, we and NCSHPO have pursued further refinement of the PA in good faith. Following review of the public comments from the NPRM and an analysis of FCC's January 12, 2004 version of the PA, we notified FCC that several provisions of the draft PA included with the NPRM would need to be revised before we could sign the PA. In addition, we reminded FCC that in January 2003, the ACHP had agreed to convene a final consultation meeting with the ACHP's Telecommunications Working Group (TWG) to review the public comments received on the NPRM and to discuss finalizing the PA.

After requesting on January 22, 2004 an extension from FCC for submission of ACHP comments, we reconvened the TWG to continue the Section 106 consultation. Given the range of issues we identified, the TWG formed a drafting committee to consult with us regarding language revisions. Since we were unable to share with the group a copy of FCC's January 12, 2004 draft PA, it was often difficult to fully explain the basis for our changes. Nonetheless, we continued to maintain a constructive dialogue and develop revised procedures that responded to the concerns raised by industry and the tribal and preservation communities.

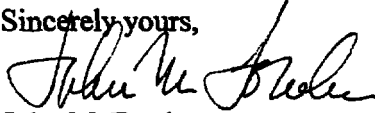
As it turned out, three weeks were insufficient to negotiate changes to the draft PA. As of yesterday, industry representatives were unable to respond definitively to the latest changes because they needed to consult with their constituents before agreeing to many of the proposed revisions. Thus, while we are providing you our recommendations, we anticipate further feedback from industry. For the record, if FCC integrated the attached recommended changes into a final PA, we would be willing to execute such a document. However, it is likely that further discussions among the consulting parties will lead to refinement of the provisions over the next few weeks.

Our goal remains to reach a final PA that provides significant streamlining for the wireless industry while maintaining reasonable safeguards for historic properties as envisioned by the National Historic Preservation Act. We are prepared to be as flexible as the law allows in reaching such an agreement, but remain uncertain of how the course of action that FCC is following will result in the execution of a final PA. We are more than willing to discuss this matter with you in the time remaining before the March Commission meeting.

Attached are the ACHP's recommended changes to the January 12<sup>th</sup> version of the PA regarding identification and evaluation and to the February 17<sup>th</sup> FCC proposed

amendments regarding tribal involvement. Should you have any questions, feel free to contact me or Charlene Dwin Vaughn at 202-606-8503. We look forward to receiving updates regarding the rulemaking process for the final PA.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John M. Fowler", written in a cursive style.

John M. Fowler  
Executive Director

Enclosure

**ACHP COMMENTS  
ON THE  
DRAFT FCC NATIONWIDE PROGRAMMATIC AGREEMENT (dated 1/12/04)**

**February 19, 2004**

***I. Summary of issues:***

The following five issues presented substantive or procedural concerns for which the ACHP is recommending revised language below to be included in the FCC's January 12, 2004 version of the Nationwide PA.

- 1. Elimination of Exclusions, No. 4 and 5, from Section III, *Undertakings Excluded from Section 106 Review*, which were viewed as controversial by a number of the commenters, particularly the preservation community.**

Exclusions No. 4 and 5 were viewed as controversial by a number of the commenters to the NPRM. These provisions, we believe, have become overly complex and would require a detailed level of analysis that should not be done solely by the Applicant. While the concept of excluding the siting of towers adjacent to areas that have contemporary architecture, or sites that have been disturbed for modern uses, there is always the possibility that the history of such sites or their immediate environs can be misinterpreted unless adequate background research is conducted. It, therefore, is our conclusion that a qualified professional would need to verify that historic properties were not affected before these exclusions could be applied. Finally, since a number of SHPOs indicated that these two exclusions are provisions that they would want to "opt out," these two exclusions would not be uniformly applied.

- 2. Revision of Tribal participation and consultation procedures in Section IV, *Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands*, so that this section clarifies FCC's tribal policies and establishes its commitment to government-to-government consultation with Indian tribes and NHOs in the implementation of the PA.**

The PA fails to emphasize that Indian tribes will determine whether to consult with Applicants or consult directly with FCC and needs to assert that the first contact with tribes, absent the explicit wishes of the tribe to the contrary, must come from FCC. The majority of the fifteen Indian tribes that responded to the NPRM raised this issue. All expressed concern that the provisions in the PA focused on delegating FCC's responsibilities for tribal consultation to applicants is not supported by Federal law.

It should be noted that since the Winter of 2003, the FCC has conducted outreach with various Indian tribes to discuss the Nationwide PA and other

FCC activities. As we understand, negotiations with the United South and Eastern Tribes (USET) has resulted in the framework for FCC policies regarding tribal coordination required under Section 106 and 101(d)(6). It, therefore, is obvious that the FCC should promote its tribal policies to Applicants.

3. **Limit the universe of historic properties** to be identified and evaluated pursuant to Section VI, *Identification, Evaluation and Assessment of Effects*, given the nature of the telecommunications activities covered by the PA and the role of FCC in administering a program that has been legislatively de-regulated.

Subsequent to the publication of the draft Nationwide PA for comment, the ACHP consulted with members of Congress regarding their concern that the identification and evaluation responsibility outlined in the PA places an unreasonable burden on industry. We believe the recommended changes below provide further predictability, consistency, and timeliness to this part of the process, while still maintaining reasonable preservation safeguards.

4. **Role of the ACHP** in the implementation of the PA, particularly as it relates to the resolution of disputes and the response to objections raised by the public, must be clarified.

Several commenters to the NPRM expressed concern about the lack of clarity of the role of the ACHP in the administration of this PA. The PA does not specify that the ACHP may provide advisory opinions when there is a dispute between the SHPO/THPO and the FCC regarding effect determinations. Nor does the PA establish an oversight or monitoring role for the ACHP for a process that will be administered primarily by applicants on behalf of the FCC.

5. **Removal of obsolete towers** vacated by applicants when they were the subjects of a Section 106 review and are located adjacent to or within a property listed in or eligible for listing in the National Register of Historic Places, is an issue that needs to be addressed.

SHPOs, the tribal community, preservationists, and members of the public have consistently raised concerns about the proliferation of towers within and adjacent to National Register properties. One of the most significant issues that they have raised has to do with the treatment of towers as they become obsolete and are vacant due to changes in technology. Industry has repeatedly stated that they have sole discretion over the disposition of their towers. Nevertheless, we continue to believe that where such towers were the subjects of a Section 106 review and are located within or adjacent to historic districts, national parks, battlefields, and other historic properties, their removal would be a benefit to the community at large.

## ***II. Recommended Changes***

### ***Issue No 1: Elimination of Exclusions, No. 4 and 5***

Delete Exclusions No. 4 and 5 from the PA

### ***Issue No. 2: Revision of Tribal participation and consultation procedures***

Overall, the proposed amendments regarding tribal provisions, dated February 17, 2004, respond to the ACHP's concerns regarding FCC's government-to-government interaction with Indian tribes under the Nationwide PA.

We offer only three suggestions for changes to the proposed amendments. The first suggestion is that the new whereas clause regarding the development of the notification system, specify which Indian tribes or inter-tribal organizations FCC consulted.

The second suggestion again relates to Indian tribes. If a definition of Indian tribes is to be included in the Nationwide PA, it must be the definition in the National Historic Preservation Act, found at 16 U.S.C. 470w(4).

Finally, we recommend that the first sentence of paragraph K include "and no modification is made in the roles of other parties to the process under this PA without their consent."

The fourteenth paragraph in the preface should be modified to further clarify how FCC reached out to tribes. Based on our review of "FCC Outreach and Consultation with Federally Recognized Indian Tribes Regarding the Nationwide Programmatic Agreement (February 5, 2004)," we suggest that this paragraph more accurately reflect the actions of FCC regarding Indian tribes. Further, the referenced document outlining FCC's interactions includes a training course offered jointly by the ACHP and the Haudenosaunee which, while attended by an FCC representative, was not an official interaction with Indian tribes regarding the Nationwide PA.

### ***Issue No. 3: Limit the universe of historic properties***

Replace Stipulation VI with the following language.

#### **"VI IDENTIFICATION AND EVALUATION**

##### **A. Preparation of Submission Packets**

In preparing the Submission Packet for Section VII of this Nationwide PA and Attachments 3 and 4, the Applicant shall:

- define the area of potential effects;
- 2 identify historic properties within the APE;
- 3 evaluate the historic significance of the identified properties, as appropriate; and,
- 4 assess the effects of the Undertaking on Historic Properties.

#### **B. Exclusion of Geographic Areas from Review**

The SHPO/THPO, consistent with relevant State or tribal procedures, may exclude specific geographic areas in which no review is required for direct effects on archeological sites or for visual effects.

#### **C. Determining the Area of Potential Effects.**

The Applicant, the SHPO/THPO, and the Commission, as appropriate, shall apply the following standards when preparing or reviewing the Submission Packet:

##### **Area of Potential Effects (APE).**

- a. The APE is the geographic area or areas within which an Undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.
- b. For the purposes of this Nationwide PA:
  - i. The APE for direct effects is limited to the area of potential ground disturbance and the historic property, or any portion thereof, that will be destroyed or physically altered by the Undertaking; and
  - ii. The APE for visual effects is defined as the geographic area in which the Undertaking has the potential to introduce visual elements that diminish or alter the setting or landscape that are considered character-defining features that contribute to the integrity of the historic property.
- c. Applicants shall apply the following guidelines when establishing the APE for visual effects related to undertakings covered by this PA.
  - i. Unless otherwise established through consultation with the SHPO/THPO and consulting tribes or NHOs, the presumed APE for visual effects for construction of new facilities is the area from which the tower will be visible:

- A within a half mile from the tower site if the tower is 200 feet or less;
- B within  $\frac{3}{4}$  of a mile from the tower site if the tower between 200 and 400 feet; or
- C. within 1  $\frac{1}{2}$  miles when the tower will be over 400 feet.

ii. Should the Applicant determine, or the SHPO/THPO or consulting tribes or NHOs recommend an alternate area of potential effect for visual effects, the Applicant and SHPO may:

- A. Agree to the alternative boundaries; or
- B. Refer the issue to the Commission, after making a good faith effort to reach a compromise.

**D. Identification and Evaluation of Historic Properties for Visual Effects.**

Applicants shall not be required to conduct any type of field surveys when identifying historic properties within the APE or otherwise for visual effects unless such surveys are deemed appropriate to identify sites of religious and cultural significance to tribes.

- 2 Applicants shall identify historic properties by reviewing the following records, which can be found within the offices of the SHPO:
  - a. properties listed in the National Register;
  - b. properties formally determined eligible by the Keeper for listing in the National Register;
  - c. properties that the SHPO certifies are in the process of being nominated to the National Register;
  - d. properties determined eligible as part of a Section 106 consensus determination of eligibility between the SHPO and a Federal Agency or local government representing the Department of Housing and Urban Development (HUD); and
  - e. properties within the State inventory that the SHPO identifies as having been previously evaluated and considered to meet the National Register criteria.

Applicants, at their discretion, are encouraged but not required to use the services of Qualified Professionals when identifying



historic properties listed and eligible for listing on the National Register.

4. The applicant shall provide the SHPO a proposed list of historic properties listed and eligible for listing on the National Register based on the foregoing identification steps in its Submission Packet.
  - a. During the review period outlined in Section VII.A, the SHPO may identify additional properties included in the State inventory and located within the area of potential effects that the SHPO considers eligible for listing on the National Register and such properties shall be added to the list.
  - b. The SHPO may also advise the Applicant that previously identified properties on the list no longer qualify for the National Register and such properties shall be removed from the list.
5. Concurrent with the identification of properties with the SHPO and in accordance with Section IV of the PA, the Commission or the Applicant, as appropriate, shall consult with the appropriate Indian tribes or NHOs to identify historic properties of religious and cultural significance within the area of potential effects that meet the National Register criteria of eligibility.

#### **E. Identification and Evaluation of Historic Properties for Direct Effects**

1. In addition to the historic properties included on the list created pursuant to Section VI. D, applicants shall identify other historic properties listed in or eligible for listing in the National Register, i.e. buildings, structures, and historic districts, within the APE for direct effects.
2. An archeological survey within the APE for a proposed tower site need not be undertaken when:
  - a. the depth of previous disturbance exceeds the proposed construction depth by at least 2 feet as documented in the applicant's siting analysis;
  - b. geomorphological evidence indicates that cultural resource-bearing soils do not occur or that they may occur within the project area but at depths that exceed 2 feet below the proposed construction depth;
  - c. the project site is within an area considered by the SHPO or a qualified professional to be "low sensitivity" or have a low potential to contain National Register eligible sites.

3. A report substantiating the applicant's findings shall be provided to the SHPO/THPO and consulting tribes. If the SHPO or consulting tribes do not object within 15 days to the applicant's findings, the applicant may assume concurrence.

4. Disagreements regarding the applicant's findings shall be referred to the Commission for resolution.

5. An archeological survey shall be undertaken if none of the conditions listed in Stipulation VI(D)(2) apply or if the SHPO/THPO or consulting Tribes so request, based upon documented evidence that supports the increased probability of the presence of intact cultural resources at the project site. The survey shall be conducted in consultation with the SHPO/THPO and consulting tribes or NHOs in the area of potential effects for direct effects. A person or persons meeting the Secretary's professional qualifications standards shall carry out all archeological surveys.

6. The applicant, in consultation with the SHPO/THPO or appropriate tribes or NHOs, shall apply the National Register criteria (36 CFR Part 63) to properties identified within the APE that have not previously been evaluated for National Register eligibility, with the exception of those included on the list created in VI.C above. A person or persons meeting the Secretary's professional qualifications standards shall carry out all archeological surveys.

#### F. Dispute Resolution

Where there is a disagreement regarding the identification or eligibility of a property, and after attempting in good faith to resolve the issue, the applicant may submit the issue to the Commission. The Commission shall review the matter in accordance with 36 CFR Part 800.4(c)(2). The ACHP also may refer eligibility issues to the Keeper for resolution.

#### G. Evaluation of Effects [ACHP has no recommended changes regarding this section (previously section E).]

#### H Use of Qualified Experts [ACHP has no recommended changes regarding this section (previously section F), except for clarification of the first line (see edits in italics).]

Identification, evaluation, and assessment *of effects made*

***Issue No.4: Role of the ACHP***

Insert a new Whereas Clause at the end of this section that states:

*WHEREAS, upon execution of this PA, the Council may still provide advisory comments to the Commission regarding the coordination of Section 106 reviews; notify the Commission of concerns raised by consulting parties and the public regarding an Undertaking; and participate in the resolution of Adverse Effects for complex, controversial, or other non-routine projects.*

***Issue No. 5: Removal of obsolete towers***

Insert a new stipulation at the end of Section VII that reads as follows:

***E. Removal of Obsolete Towers***

*Applicants that have constructed towers under the terms of this PA which resulted in the siting of a new tower adjacent to or within the boundaries of historic property are encouraged to disassemble such towers should they become obsolete or remain vacant for a year or more.*